STATE OF MICHIGAN
IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

The Honorable Mark J. Cavanagh, Presiding Judge

CASTLE INVESTMENT COMPANY,

Plaintiff-Appellant,

v

CITY OF DETROIT, A Municipal, Corporation,

Defendant-Appellee.
_____/

Supreme Court No. 121598

Court of Appeals No. 224411

Wayne County Circuit Court
No. 98-836330-CZ

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BRIEF ON APPEAL - APPELLEE CITY OF DETROIT

ORAL ARGUMENT REQUESTED

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STATEMENT OF JURISDICTION

The Defendant-Appellee, City of Detroit, concurs in the Statement of Jurisdiction set forth in the Plaintiff-Appellant's Brief.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. IS THE CITY OF DETROIT ORDINANCE, WHICH HAS SURVIVED COURT CHALLENGES ON NUMEROUS OCCASIONS AND HAS BEEN RELIED UPON BY THE CITIZENS OF THE CITY OF DETROIT FOR OVER 20 YEARS, VALID AND ARE PLAINTIFFS TIME BARRED FROM ATTACKING SAME BASED ON THE DOCTRINE OF LACHES, AND ON OVERRIDING PUBLIC POLICY CONSIDERATIONS?

The Trial Court answered, "Yes."
The Court of Appeals answered, "Yes."
Plaintiff-Appellant answers, "No."
Defendant-Appellee answers, "Yes."

II. IS THE PROVISION IN THE ORDINANCE WHICH REQUIRED APPROVAL OF CITY COUNCIL BEFORE THE GUIDELINES WERE EFFECTIVE SEVERABLE, PURSUANT TO CITY CHARTER?

The Trial Court did not address this issue.
The Court of Appeals did not address this issue.
Plaintiff-Appellant answers, "No."
Defendant-Appellee answers, "Yes."

III. IS THE REQUIREMENT THAT CITY COUNCIL APPROVE THE GUIDELINES INVALID BECAUSE IT CONFLICTS WITH THE SEPARATION OF POWERS PROVISIONS OF THE CITY CHARTER?

The Trial Court answered, "No."
The Court of Appeals declined to address the issue.
Plaintiff-Appellant answers, "No."
Defendant-Appellee answers, "Yes."

INTRODUCTION AND COUNTER-STATEMENT OF FACTS AND PROCEEDINGS

To protect the unwary citizen from blighted neighborhoods, substandard or defective housing, and to meet minimum standards of safety and habitability, the City of Detroit in 1976, enacted City of Detroit Ordinance 124-H, Sections 12-7-1, et seq, as amended in 1977 by Ordinance 213-H, Sections 26-3-1 through 26-3-11 of the Detroit Municipal Code ("the Ordinance"). (Plaintiff's Exhibits 1, 2 and 3 [1]attached to its Brief). The Ordinance 124-H, is a pre-sale inspection ordinance which requires that a Certificate of Approval and an Inspection Report be issued for a reasonable fee before certain dwellings are sold or transferred. The Ordinance has been in existence for over 20 years and has been upheld as constitutional and a valid use of the City's police powers to protect the health, welfare, and safety of its citizens. Plaintiff Castle Investment is a large management company which owns several real estate properties in the City of Detroit.

In this action Castle Investment Company challenges the validity of Detroit Ordinance 124-H ('the Ordinance") that generally requires inspection of a one- or two-family residential structures by the Department of Buildings and Safety Engineering when such a structure is sold. Castle Investment attacks the Ordinance for an alleged procedural irregularity in its adoption. Plaintiff alleges that the City Council failed to approve and publish inspection guidelines to be used in inspections relating to the enforcement of the article as required by the Ordinance. (App 3a, Complaint, para 8). The Plaintiff, therefore, seeks a declaration that the Ordinance is invalid, an injunction against continued enforcement of the Ordinance and the return of fees in excess of a

[1] These documents and others were entered in the record attached to Defendant's Cross Motion for Summary Disposition and appropriately belong in the Appendix. However, Plaintiff placed the documents as Exhibits attached to its Brief. All documents labeled as such will be referred to as Exhibits were applicable.

million dollars it has paid for inspections performed pursuant to the Ordinance. (App. 5a, Complaint, paras 16-17)

A. Facts Alleged in Plaintiff's Complaint

Plaintiff sought to prosecute this action as a class action[2] on behalf of all individuals, partnerships both general and limited, corporations both domestic and foreign, and any and all other entities [hereinafter, the class members] who have been required to pay fees for a Certificate of Approval or an Inspection Report under City of Detroit Ordinance 124-H sections 12-7-1, et seq., as amended by ordinance 213-H, sections 26-3-1, et seq. of the Municipal Code of the City of Detroit. (App 2a-3a, Complaint Para 1).

The gravamen of the complaint is that the Detroit City Council failed to formally approve the inspection guidelines as required under Ordinance 124-H, such that no guidelines exist for inspection upon which a certificate of approval or an inspection report may be received. (App 3a-4a). Specifically, Ordinance 124-H, § 12-7-6, as amended by 213-H,§ 26-3-1 et seq. states in pertinent part:

Sec. 26-3-6. Inspection Guidelines.

> The department shall prepare a list of inspection guidelines to be used in inspection relating to the enforcement of this article. The guidelines shall construe the complete scope of repairs required for the issuance of the certificate or to be noted in an inspection report. The guidelines shall not be effective until approved by city council. The inspection guidelines shall be issued to the applicant for certificate of approval or inspection report and made available free of charge to the general public. The city shall notify the general public, as the city council shall recommend by resolution that the guidelines

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[2] Defendant City's Motion for Reconsideration of Certification of the Class Action was granted. (App 17b) However, because the trial court granted Defendant's Motion for Summary Disposition, the issue became moot and was not addressed further.

exist and are available. (Plaintiff's Exhibit 1 and 3)

Castle Investment alleged that instead of approving the use of the guidelines for the use in the Ordinance and notifying the general public by resolution that the guidelines exist and are available, the action of the council was to "receive and place on file" the guidelines. It alleged that receiving and placing on file does not constitute approval of the guidelines. Sec. 26-3-6 of the ordinance states that the guidelines shall not be effective until approved by city council. Since the guidelines relating to the enforcement of the ordinance were not approved and published in accordance with the ordinance requirements, Plaintiff alleged that the guidelines are not effective and the ordinance is not valid and cannot be enforced. (App 3a-4a, Complaint, paras 8-12).

Plaintiff further alleged that since the Council did not approve the guidelines, the Department of Buildings & Safety Engineering is acting in accordance with its own will and is usurping the legislative law-making function in violation of the constitutional doctrine of separation of powers. Thus the ordinance, besides being invalid and unenforceable, is also unconstitutional. (App 5a, Complaint para 15)

B. The Detroit City Charter And Code Provision And Historical Background.

It is the claim of the Plaintiff that the ordinance in question here is invalid based upon a perceived failure of City Council to formally approve rules and regulations promulgated by the Building and Safety Engineering Department for inspection of one-and two-family residences in order to secure a Certificate of Approval. Plaintiff's claim is without merit. The ordinance in question was formally approved on June 9, 1976. (App 43b - 48b). Prior to City Council approval, City Council was provided with a copy of the inspection rules and regulations which had been

utilized by the Building and Safety Engineering Department since at least November of 1974 regulating the sale of one-and two-family dwellings. (App 36b).

On October 21, 1974, Detroit City Council issued a Declaration of Emergency regarding the condition of housing. (Plaintiff's Exhibit 6) With the Declaration of Emergency, City Council enacted an emergency ordinance which required a Certificate of Approval by the Buildings and Safety Engineering Department for the sale of one-and two-family dwellings. (Plaintiff's Exhibit 6). Section 12-7-3 of the emergency ordinance provided that the Building and Safety Engineering Department promulgate rules and regulations for inspections of one-and two-family residences in order to provide that those dwellings conform with "minimum standards of livability and habitability." (Id.)

Immediately thereafter, on October 22, 1974, the Building and Safety Engineering Department provided to City Council the rules and regulations for a dwelling requiring the Certificate of Approval for a sale or conveyance. (App 36b-38b). The rules were to become effective immediately. These rules and regulations were transmitted to City Council and were received, placed on file and made available to the general public.

In the interim, on January 21, 1975, Detroit Mayor Coleman A. Young wrote a letter to the City Council informing them that he was submitting "to them a proposed ordinance to regulate the sale or transfer of one-or-two family dwellings". He explained, among other things, that the enactment of the ordinance meets "the urgent need for neighborhood protection from the blighting effect of substandard residential buildings." He reminded them that the current ordinance, was soon to expire. (App 39b, Mayor Young letter, January 21, 1975).

Upon receipt of the above letter, the City Council, on February 5, 1975, set a public hearing

to receive the public's input with regard to the ordinance proposed by the mayor in the communication of January 21, 1975 to the City Council. That hearing was held on February 12, 1975. (App 40b, Resolution setting hearing.)

On February 18, 1975, City Council passed a resolution establishing a Task Force to work with the director of the Buildings and Safety Engineering Department with respect to the housing inspection ordinance. The Task Force was then assembled and worked diligently at its task for nearly a year and a half. The resolution was the result of the February 12th hearing on the proposed ordinance wherein citizen organizations gave testimony and valuable input on what provisions should be included in the ordinance. (App 41b, Resolution of February 18, 1975). The resolution noted the need to continue an ordinance to prohibit the sale of "as-is" housing and to design a home buyer protection ordinance to ensure that anyone buying a house gets one that is habitable. (App 42b, Resolution of February 18, 1975).

In the interim, City Council passed Ordinance 104-H. (Plaintiff's Exhibit 7). That ordinance provided that the Building & Safety Engineering Department could promulgate rules and regulations in order for landlords to obtain a Certificate of Approval.

The Task Force completed its assignment. On June 8, 1976, Buildings and Safety Engineering Director Lederer formally submitted his report to Council. (Plaintiff's Exhibit 4). His report notes that he is enclosing a copy of the recommended inspection rules and regulations to be used in inspection relating to the implementation of the new ordinance. He also adds: "These rules and regulations were previously approved by your Honorable Body and are presently used in the implementation of Ordinance 104-H." (Id.). The recommended Inspection Rules and Regulations, is, by its nature, extremely detailed, dealing with technical building issues of a type more expertly

understood by members of the Building Department and the Task Force, and not generally by elected city officials, such as council members.

Finally, on the following day, June 9, 1976, following the third reading of the ordinance, the City Council passed the proposed ordinance (App 436b-48b, Council minutes of June 9, 1976). The guidelines recommended by Building Department Director Lederer and the Task Force were made part of the public record immediately following the text of the ordinance.

Subsequently, the ordinance was amended on October 5, 1997. The amendment only amended certain portions of the ordinance. The amended portions of the ordinance, however, refer back to the guidelines of Section 12-7-6. (Plaintiff's Exhibit 2). Obviously, had City Council not believed that the guidelines were effective, there would be no reference back.

Since that time, this ordinance has been successful in protecting unsophisticated home buyers in the City of Detroit from the sharp practices of those who deal in volume sales of derelict housing in the City of Detroit. Also since that time, not uncoincidentally, the ordinance has been under unrelenting attack from those who would profit at the expense of those whom the ordinance was designed to protect.

C. Litigation History of Ordinance

Shortly after the ordinance was enacted, the constitutionality of it was challenged in two Court of Appeals decisions found at Butcher v Detroit, 131 Mich App 698; 347 NW2d 702 (1984) and Butcher v Detroit, 156 Mich App 165; 401 NW2d 260 (1987). Both actions, as here, were class actions which attacked the validity of the ordinance on numerous grounds, including the constitutionality of same. The ordinance was upheld.

In addition to numerous other circuit court challenges, the ordinance was the subject of a

third Court of Appeals opinion in the case of Joy Management, Ernest Karr and Dora King v City of Detroit, 183 Mich App 334; 455 NW2d 55 (1990). Ernest Karr, a named plaintiff in the Joy Management case, is also the agent of the instant plaintiff, Castle Investment Company.

A long history of litigation can be traced in connection with this ordinance brought by the instant Plaintiff and/or by Joy Management whose principal is Ernest Karr, who happens to also be principal for the instant Plaintiff, Castle Investment Company. The following litigation history exists:

A. Numerous cases in which Castle Investment Company, Joy Management and/or Ernest Karr attack the constitutionality of the same City ordinance under attack in the instant case:

1. Case No. 85-511887 CH, Joy Management Company, Ernest Karr and Dora Ewing v City of Detroit. Plaintiffs attack the constitutionality of the instant ordinance in Counts 4, 6 and 11 of their Complaint. Plaintiffs' attack was rejected by the Court of Appeals in 183 Mich App 334.

2. Case No. 94-401104 CZ, Castle Investment Company, Joy Management, Michigan Corporations, Bobbie Sledge and Ernest Karr v City of Detroit. This case challenged the constitutional authority of the City of Detroit's Building Department to issue tickets in enforcement of the same ordinance attacked in the instant case. The Court of Appeals, Case No. 175553 (unpublished) decided on May 24, 1996 that summary disposition for the defendant was properly granted. (App 49b-55b).

B. Two reported Court of Appeals cases by Joy Management against the City of Detroit related to plaintiffs' claims for recovery of fire insurance proceeds retained by the City of Detroit for unpaid taxes: Joy Management Company v City of Detroit, 176 Mich App 722 (1989) and Adair and Joy Management v City of Detroit, 198 Mich App 506 (1993).

C. There are other litigation cases in Wayne County Circuit Court involving Ernest Karr, Castle Investment Company and/or Joy Management Company. The list of case numbers are not listed here but were named in Defendant's Brief in the Court of Appeals (App 23b-26b).

It is clear thus far that Mr. Karr and his various alter-ego companies have maintained an almost continuing assault on this ordinance without significant success, on almost any ground. They have also imaginable demonstrated what can only be characterized as a remarkable eagerness to use the court system to facilitate their business practices.

The instant case is yet another chapter in what has been a long saga.

PROCEDURAL HISTORY

Upon receipt of the complaint, pursuant to MCR 2.108(B) and MCR 2.116(C)(8), Defendant City of Detroit filed a motion for summary disposition in lieu of an Answer to Complaint on the ground Plaintiff failed to state a claim upon which relief can be granted. (App 2b-3b). The motion was predicated on the proposition that the requirement that City Council approve the guidelines was invalid because it conflicts with the separation of powers provision of the City Charter by infringing on the rule making power of the Executive Branch. (App 4b-7b). Defendant also argued that the invalid portion of the ordinance was severable and that the ordinance was otherwise valid. (App 7b-9b). Further, the City argued that the ordinance did not violate the United States or Michigan Constitution and that to invalidate the Ordinance would violate the intent of City Council, even if the requirement that City Council was to approve the guidelines were valid. The trial court denied the motion in an Opinion and Order dated April 29, 1999. (App 11b-16b).

Subsequently, Castle Investment filed a Motion for Summary Disposition, pursuant to MCR 2.116(C)10 on the ground that there was no genuine issue of material fact and Plaintiff was entitled

to judgment as a matter of law.

Pursuant to 2.116(C)(8), Defendant-Appellee responded with a Cross Motion for Summary Disposition based upon theories of laches, estoppel and severability of the contested provision of the ordinance. (App 18b-35b). Defendant maintained that, even if Plaintiff's complaint is true, the plaintiff is entitled to no relief because its claim is based on an erroneous conclusion of law, and the alleged questionable clause is severable. (App 33b). The City Council's failure to approve the guidelines renders the Ordinance invalid and unenforceable. The guidelines were "received and placed on file" by City Council. Defendant-Appellee asserts that by doing so City Council made the guidelines part of the public record and that, for all intents and purposes, "receiving and placing on file" is the equivalent of formal approval. The trial court denied Plaintiff-Appellant's Motion for Summary Disposition and granted Defendant's Motion for Summary Disposition on the ground of laches and collateral estoppel without detailed comment. (App 14a)

A Motion for Reconsideration brought by Plaintiff-Appellant was similarly denied. (App 16a, 23a).

Plaintiff-Appellant then appealed as of right to the Court of Appeals. Defendant-Appellee Cross Appealed as to the Trial Court Order Denying the initial Motion for Summary Disposition. (App 57b-67b).

In its Opinion, dated March 19, 2002, the Court of Appeals affirmed the trial court's granting of summary disposition in favor of Defendant on the basis that the claim was barred by laches. The court declined, based on mootness, to rule on Defendant-Appellee's Cross Appeal. (App 25a-29a)

Plaintiff then filed a Motion for Rehearing with the Court of Appeals which was denied on May 1, 2002. (App 35a).

The Supreme Court granted Plaintiff's Application for Leave to Appeal by Order of this Court dated March 25, 2003. (App 43a)

ARGUMENT

I. THE CITY OF DETROIT ORDINANCE, WHICH HAS SURVIVED COURT CHALLENGES ON NUMEROUS OCCASIONS AND HAS BEEN RELIED UPON BY THE CITIZENS OF THE CITY OF DETROIT FOR OVER 20 YEARS, IS VALID AND PLAINTIFFS ARE TIME BARRED FROM ATTACKING IT ON THE DOCTRINE OF LACHES AND FOR OVERRIDING PUBLIC POLICY CONSIDERATIONS.

The Court of Appeals properly affirmed the trial court's decision to grant Defendant's Motion for Summary Disposition on the ground of the doctrine of laches and public policy considerations. The compelling equities of this case under the circumstances and case law clearly establish that the doctrine of laches was properly applied to this case.

An issue before the Court is whether the ordinance is invalid as a result of City Council's failure to approve the Building and Safety Engineering Department's rules and regulations some 23 years ago, when the Ordinance was formally approved by City Council prior to the guidelines.

The Court of Appeals reviews de novo the trial court's decision on a motion for summary disposition. Spiek v Dep't of Transportation, 456 Mich 331, 337; 572 NW2d 201 (1998). The constitutionality of an ordinance is evaluated under the same rules as statutes, and accordingly, is reviewed de novo as a question of law. Plymouth Charter Twp v Hancock, 236 Mich App 197, 199; 600 NW2d 380 (1999).

Municipal ordinances are presumed to be valid. Township of Farmington v Scott, 374 Mich 536; 132 NW2d 607 (1965). In construing a statute, it is the duty of the court to discern the intent of the legislature in enacting relevant provisions. O'Donnell v State Farm Mutual Insurance Co, 404 Mich 524; 273 NW2d 829 (1979). A municipal ordinance is presumed to be valid and that

presumption may be overcome only by clear and satisfactory proof. Township of Farmington v Scott, supra. The burden is upon a plaintiff to demonstrate the invalidity of a challenged ordinance. Nosal v City of Lansing, 14 Mich App 733; 165 NW2d 926 (1969); City of Detroit v Bowden, 6 Mich App 514; 149 NW2d 771 (1967).

Challenges to the validity of an ordinance have been unsuccessful for informalities and irregularities in the procedure which led to the adoption of the ordinance, or for failure to comply with procedural prerequisites, when the ordinance has been in existence for a length of time, and there has been public acquiescence in the ordinance on the basis of estoppel or for public policy considerations. This principle is demonstrated in Edel v Filler Township, below, and its progeny.

In Edel v Filler Township, Manistee County, 49 Mich App 210; 211 NW2d 547 (1973), the Court of Appeals considered an action brought by a property owner challenging the validity of a township zoning ordinance. Plaintiff contended that the township failed to strictly comply with the notice requirement of the enabling legislation. It was determined in Edel that the ordinance had a procedural or technical flaw. The ordinance, however, had been in existence for 18 years and had been relied upon by property owners and sellers. The trial court granted plaintiff's summary judgment, determining that the zoning ordinance was invalid as a result of the township's failure to follow a statutory requirement concerning maintenance of a book of ordinances as required by the Township Ordinance Act. The legislature, in enacting the Township Ordinance Act, required that prior to an ordinance becoming effective, the township must maintain an ordinance book. The township in this case failed to do so and was in direct contravention of the legislative requirement. The Court of Appeals noted that when an ordinance has been the subject of public acquiescence and

reliance for many years, the reasonableness of a belated challenge was open to question. Id. at 217. The court then noted that challenges to long existing ordinance have been successfully defended on the basis of estoppel or overriding public consideration.

Accordingly, procedural irregularities in the adoption of an ordinance which has been in existence for a while and the public has acquiesced in do not render an ordinance void on estoppel or pubic policy grounds. This principal is borne out in a number of cases.

In Trainor v City of Wheat Ridge, 697 P2d 37, 39 (Colo App 1984) plaintiffs attacked the validity of Ordinance 98 as it applied to their property. They challenged the adequacy of the procedures followed in its enactment, not the constitutionality of the ordinance itself. Relying on Edel v Filler Township, supra, and other cases, the Court held that "after long public acquiescence in the substance of an ordinance public policy does not permit such an attack on the validity of the ordinance because of procedural irregularities". Trainor, supra, at 39; Hutcherson v Criner, Launderdale County Commissioner, et al, 11 SW3d 126 (Tenn1999); Edel v Filer Township, 49 Mich App 210; 211 NW2d 547 (1973); Taylor v Schlemmer, 353 Mo 687; 183 SW2d 913 (Mo 1944); Struyk v Samuel Braen's Sons, 17 NJ Super 1; 85 A2d 279 (1951).

In Trainor, the zoning ordinance under attack had been in effect for over ten years before the plaintiffs filed their complaint. Thus, the court held that given the extensive public reliance on the ordinance, such was immunized from a belated attack on various procedural grounds. The same holds true for the Ordinance 124-H, as amended, that is under attack on procedural grounds by Castle Investment. The Ordinance has been in effect for over twenty years and has been relied on extensively by the residents of City of Detroit to protect them and to increase the habitability of the houses sold. The Ordinance, therefore, is immunized from an attack on faulty procedural grounds,

such as the city council's failure to formally approve guidelines for inspection of residential property, when it did approve the Ordinance itself and amended the same. The Ordinance has been for the public good to uplift the standard of housing in the City of Detroit.

A challenge to an ordinance for failure to properly published the ordinance was rejected by the Iowa Supreme Court in City of Creston v Center Milk Products Company, 243 Iowa 611, 614-615; 51 NW2d 463, 465 (1952):

> As pointed out by the trial court, the ordinance, if valid, had been in effect for 21 years at the time defendant assailed it. Under it, the city had granted more than 400 building permits. In general, the owners and occupiers of property in Creston had relied upon its validity in dealing with and improving such property since 1930. Apparently its validity has never been challenged in any suite prior to the present action.
>
> For 21 years the public acquiescenced and permitted the exercise of authority, under the zoning ordinance throughout the city. During this time and in reliance upon the validity of the ordinance there have been changes and conditions involving extensive property interests. An adjudication that the ordinance never took effect because of the failure to strictly comply with the statute requiring its publication after its adoption would result in much confusion and loss. Such a sacrifice should not be demanded upon merely technical grounds. Under the circumstances, the doctrine of estoppel is applicable. After such long acquiescence by the public with the results above stated, no one may contend the ordinance never took effect because of irregular publication.

Such public policy considerations were alluded to by Justice William J. Brennan, Jr., then a Judge of the New Jersey Superior Court in the case of Struyk v Samuel Braen's Sons, 17 NJ Super, 1, 9; 85A 2d 279, 282-283 (1951). A ten year ordinance was upheld on public policy grounds for procedural irregularities because "it has been accepted as a valid enactment for a long period of time, and property owners affected by it have conformed to its provisions, and have fixed their status

accordingly." Id.

The language has been quoted with approval by the Michigan Court of Appeals in the case of Northville Area Non-Profit Housing Corp v Walled Lake, 43 Mich App 424, 434; 204 NW2d 274, 280 (1972), where the City attempted to prove its own zoning ordinance, in effect little more than four years, invalid because of lack of publication of notice of hearing. In a comprehensive statement of public policy, the Court of Appeals in Northville stated:

> In the orderly process of handling real estate transactions where they are effected by provisions of zoning ordinances and amendments, it is essential that the members of the general public and the people buying or selling real estate must be able to rely on the validity of the public record, to wit, a zoning ordinance and zoning map issued in accordance with such zoning ordinance, without the necessity of poring over musty files and searching newspaper morgues, going back years in order to avoid a claim by other persons that there was a failure to comply with some technical requirement of law in the adoption of the ordinance in question. 43 Mich App at 4350436, 204 NW2d at 280.

The court in Northville then concluded that a challenge to a zoning ordinance made only four years after its enactment on the grounds that the ordinance was improperly enacted was precluded on public policy grounds.

Similarly, in the case of Richmond Township v Erbes, 195 Mich App 210; 489 NW2d 504 (1992), lv denied 441 Mich 931 (1993) the Court of Appeals again held a challenge to an ordinance 13 years after enactment, on the ground of procedural irregularities would not be entertained on public policy and estoppel grounds. In that case, as here, the claim was that the ordinance did not follow the mandatory requirements of the enabling statute.

In Howell Township v Rooto Corporation, 463 Mich 347; 617 NW2d 533 (2000), plaintiff township attempted to enforce an ordinance where the township sought to recover costs the township

had incurred in fighting a "toxic fire". The claim presented was that the ordinance was invalid since the township failed to timely record the ordinance in a statutorily required "book of ordinances". The Township Ordinance Act requires recording of newly enacted ordinances in a book of ordinances. The township clerk admittedly failed to do so. The Court Appeals held that technical recording requirements of the statute did not invalidate the ordinance.

Plaintiff-Appellant has attempted to make much of the fact that some of the cases cited by Defendant involve zoning ordinances. The Howell case, supra, is not a zoning ordinance, but an ordinance empowering a township to collect reimbursement from landowners for the cost of fighting fires involving hazardous materials on the landowner's property, under specific circumstances. The ordinance was challenged because of the technicality; it had not yet been recorded in the township ordinance book. The Court of Appeals held and the Supreme Court affirmed that, although the legislature had placed upon township clerks the literal duty to keep the record book, emphasizing same by use of the mandatory "shall," "that obligation is unrelated to the effectiveness of the township's ordinances. There is no reason that an ordinance should be invalidated by the township clerk's failure to record it in the book of ordinances." The court noted that the aggrieved landowner was able to go to the township office and obtain a copy of the ordinance, irrespective of whether or not it had been recorded as required by the legislature.

The case is precisely on point with the instant facts here. Here, the City Council failed to meet its (self-imposed) requirement of separately approving the inspection guidelines, but did place them on file and made them part of the public record. They have always been available to any interested member of the public. If the failure to fulfill a mandatory obligation imposed by the legislature did not invalidate the ordinance in Howell, supra, then surely the self-imposed obligation

that was overlooked here should be viewed as similarly inconsequential. It is also worth noting that the ordinance in Howell, supra, had not been in effect for sixty (60) days and yet the Supreme Court upheld its validity.

A building code ordinance has been challenged for procedural irregularities. In Ninth Street Improvement Co v Ocean City, 90 NJL 106; 100 A. 568 (1917), the validity of the building code of the defendant city was challenged on the ground of irregularities in the procedure leading to its adoption. The building code was held valid and the court said:

> "But aside from the consideration, it cannot be overlooked that the attack upon the ordinance in question was not undertaken until over 12 years had elapsed since the date of its adoption. During the interval it is reasonable to assume that the citizens of the municipality affected by the provisions of this ordinance, regulating, as it specifically expresses, 'the manner of building dwelling houses, and other buildings', have expended their means and conformed their building operations to comply with its provisions, and have fixed their status as property owners accordingly. In such a situation, this prosecutor is too late to be heard to complain of alleged informalities and irregularities in the procedure, which led to its adoption."

Similarly, the procedural attack on the instant Ordinance was properly rejected by the trial court.

A. The Court of Appeals Properly Applied the Doctrine of Laches

Plaintiff argues that the Court of Appeals erred in applying the doctrine of laches because there was insufficient evidence to support a finding of financial prejudice to the defendants if the ordinance is found to be invalid. Such is not the case. As the Court of Appeals noted, in the time that the ordinance has been in place, the defendant has collected innumerable fees and fines in reliance upon the validity of the ordinance and its accompanying guidelines. Should the court declare the ordinance invalid, paving the way to prosecution of plaintiff's class action, the defendant

would be faced with a monumental and well-nigh impossible challenge with regard to the record keeping function, alone. The number of transfers of property within the City of Detroit since the enactment of the ordinance numbers in the many thousands.

Here, the City has proceeded under the ordinance through literally countless transactions and not only the City, but its citizens have expended labor and funds to bring property into compliance with the ordinance. The Ordinance has been for the good of the public interest, and arguably citizens have benefited from and have relied on this Ordinance for their protection and welfare and to increase the quality of housing sold in Detroit. To unravel the ordinance after more than two decades of reliance would work an obvious injustice on those who have properly brought their property into compliance over so many years. Even if the statute of limitations would limit the number of years for recovery, the accounting task would be burdensome and the costs in the millions of dollars.

In addition, the prejudice to the City recognized by the Court of Appeals is particularly strong in the case of a large city, with virtually countless transfers of property, and when so many years have passed in reliance upon the ordinance. As the Court of Appeals indicated:

> "Defendant and presumably thousands of home buyers and sellers have relied on the validity of the ordinance. To now invalidate this ordinance would create chaotic conditions beyond all comprehension [citation omitted] as all of those potential plaintiffs line up to sue defendant to recover the fees or fines they paid connected with the requirements of this ordinance."

Plaintiff's reliance on Sprague v Casey, 520 Pa 38; 550 A2d 184, 189 (1988) and American Trucking Assoc v Conway, 152 Vt 363; 566 A2d 1323, 1334 (1989) does not negate Defendant's argument. The cases are inapplicable to the case at bar. In Sprague an election procedure was found unconstitutional. In American Trucking a fee imposed upon truck drivers was declared

unconstitutional because it was discriminatory. Plaintiff cannot argue in the instant case that the Ordinance itself is unconstitutional.

Significantly, the validity and constitutionality of the Ordinance 124-H, Sec 12-7-1 et seq. requirement of an inspection fee and inspection of one and two family dwellings to obtain a certificate of approval or a valid inspection report from the City of Detroit before a person may sell or transfer a one or two-family residential structure has been upheld. Butcher v City of Detroit, 131 Mich App 648; 347 NW2d 702 (1984); Butcher v Detroit, 156 Mich App 165; 401 NW2d 260 (1987); Brand v Hartman, 122 Mich App 326, 330-331, 333; 332 NW2d 479 (1983). The courts have recognized that the city has power to require an inspection before a homeowner sell a family residence as such an inspection deters fraud and helps enforce the city's building code.

Plaintiff's argument that the doctrine of laches was improperly applied to this case should be rejected. Compelling equities justify the granting of the motion in this case. In determining whether a party is guilty of laches, each case must be decided on its particular facts. City of Troy v Papadelis (On Remand), 226 Mich App 90, 97; 572 NW2d 246 (1997).

The ordinance at issue here was clearly designed to protect the citizens of the city and stabilize property values and the habitability of homes. The ordinance attempted to establish reasonable safeguards for the public health, safety, and welfare insofar as affected by the maintenance of residential structures and in general to secure safety to life and property from all hazards incident to the use and occupancy of dwellings. Accordingly, the Court of Appeals reliance upon public policy considerations was particularly appropriate under the specific facts of this case. As noted in Sedger v Kinnco, 177 Mich App 69; 441 NW2d 5 (1988), a finding by a trial court of prejudice to a party, will not be set aside unless clearly erroneous. See also Keller v Paulos, 5 Mich

B. Allowing Claims in this Circumstance Would Be Inequitable Because the Plaintiff And/or its Alter Egos Have Been Litigating this Ordinance for Many Years, and Simply Failed, until Recently, to Discover the Technical Flaw of Which They Now Complain.

Laches is an equitable defense based primarily on circumstances which render inequitable the granting of relief to a dilatory plaintiff. City of Holland v Manish Enterprises, 174 Mich App 509, 512; 436 NW2d 398 (1988). The doctrine of laches applies when there has been an unexcused or unexplained delay in commencing an action and a corresponding change of material condition, which results in prejudice. Dep't of Public Health v Rivergate Manor, 452 Mich 495, 507; 550 NW2d 515 (1996).

To successfully assert the defense of laches, the defendant must demonstrate that there was a passage of time combined with some prejudice to the party asserting the defense which was a result of the plaintiff's want of due diligence. Eberhard v Harper-Grace Hospitals, 179 Mich App 24, 38; 445 NW2d 469 (1989); Great Lakes Gas Transmission Co v MacDonald, 193 Mich App 571; 577; 485 NW2d 129 (1992). Defendant has clearly established the passage of time. Castle Investment waited over twenty years to file this claim. This shows its lack of due diligence specifically when viewed in the light that it is a major corporation which has consistently attacked this Ordinance and related housing Ordinances zealously on more than one procedural ground in several lawsuits. As the Court of Appeals noted:

> It is apparent from the cases cited by Defendant that Plaintiff's counsel represented Plaintiff or persons and entities similarly situated to the instant Plaintiff in court challenges of this same ordinance before 1998. Clearly, Plaintiff and its counsel had ample opportunity to investigate the validity of this ordinance in the previous court challenges and the failure to discover this technical error and challenge the ordinance on this ground at an earlier date suggests that

Plaintiff has been less than diligent."

The Court went on to note that Plaintiff's counsel was involved in at least three cases that were appealed to the Court of Appeals which challenged the validity of the same ordinance. In one, the instant plaintiff was also a party. The Plaintiff, and its various alter egos constitute the only "class" who are in fact represented here. This ordinance, consistent with its purpose in addressing an urban emergency, sought to prevent the practices of a small number of large scale landlords who would prefer to maintain their rental properties and properties sold at a much lower standard of habitability than that required by this ordinance.

Castle Investment's argument that the accrual of a cause of action may be postponed until plaintiff discovers the existence of the cause of action cannot be justifiably applied to the instant case. Its argument that the presumption of the ordinance validity provided no reason to question the approval of the guidelines without research and advice from an attorney is without merit, in light of the several attacks Castle Investment has initiated on this very Ordinance by its agents and principles as seen from its litigation history. (See App 23b-26b, 56b).

Castle Investment's failure to specifically present this claim in previous litigation involving the ordinance should be ignored. Castle Investment has access to attorneys, and has attacked the Ordinance on various grounds in previous litigation. The failure to raise this specific claim about the validity of the ordinance on this ground should be deemed waived due to the lack of reasonable diligence, just as it is waived when a party fails to develop an argument at the trial level. See generally Caldwell v Chapman, 240 Mich App 124, 132; 610 NW2d 264 (2000). The issue apparently is an after thought to attempt one more attack on the Ordinance to avoid complying with the Ordinance. Under the circumstances Castle Investment has waived the right to question the

validity of the ordinance on this ground involving the ordinance.[3]

Castle Investment, and its agents or principals have attacked the constitutionally and validity of the ordinance on several grounds on more than one occasion. See e,g, Castle Investment, Bobbie Sledge Ernest Karr, and Joy Management v City of Detroit, unpublished opinion, decided 5/24/1996 (Court of Appeals No 175553, LC No 94-401104VC); (App 49b-50b); See complaint for Declaratory and Injunctive Relief and Decision. (App 51b-55b). Plaintiffs challenged the legality of appearance tickets issued against Plaintiffs for violation of Ordinance 124-H as amended. In Castle Investment the housing enforcement inspectors employed by the City of Detroit issued complaints stating that defendants unlawfully allowed the listed dwelling to be occupied without first obtaining a certificate of approval, as required by Ordinance 124-H. The Plaintiffs in Castle Investment, supra, alleged that these appearance tickets were not valid and violated its right to due process of law. They alleged that the City had not passed an ordinance authorizing employees of the Building and Safety Engineering Department to issue and serve appearance tickets. Therefore, without proper authorization to issue appearance tickets said tickets were void and invalid and violated the separation of powers doctrine. (See Detroit v Sledge, 223 Mich App 43; 565 NW2d 690 (1997), where one of its employees or agents, Defendant Sledge, filed fourteen motions on procedural grounds to dismiss the tickets in the district court alleging the same reasons and more).

In Joy Management Company v Detroit, 183 Mich App 334; 455 NW2d 55 (1990), plaintiff challenged the legality of the provisions of Ordinance 124-H, the ordinance governing the inspection and sale of residential properties, which also provides that each day of non-compliance constitutes

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[3] In the trial court and Court of Appeals Castle Investment argued that the ordinance violated its due process right and is unconstitutional. However, it has not raised the issue here and it must be deemed abandoned and waived.

a separate offense. The Court rejected plaintiff's arguments there stating, "Defendant does not exceed its statutory authority to punish for violations of its point-of-sale ordinance by providing that each day of violation constitutes a separate offense." Id., at 342. In addition, the Court rejected plaintiff's argument that the provision making each day of non-compliance a separate offense violated it right to due process under the Michigan or Federal constitution. Id.

To accept Castle Investment's argument under the facts and circumstances undermines both the intent and purpose of the ordinance. The cardinal rule of statutory construction is to give effect to or to attempt to carry out the intention of the drafters of the legislation. Storey v Meijer, 431 Mich 368; 429 NW2d 169 (1988). The history of City Council's dealings with the issues addressed in the Ordinance gives no indication that Council intended that the Ordinance should be nullified if Council failed to take action with reference to the guidelines adopted by the Department of Buildings and Safety Engineering. On the contrary, it is clear that Council intended and still intends that the Ordinance be fully implemented and enforced.

The guidelines have been submitted to City Council. Despite having ample opportunity to do so, Council has expressed no disagreement with or disapproval of the guidelines; nor has it done anything to indicate an intent that its own Ordinance should be nullified. The most reasonable explanation for Council's inaction with regard to the guidelines is that Council recognizes its lack of authority to approve rules adopted by the executive branch and does not wish to overstep the lawful limits of its powers. If the Court were to interpret Council's silence with reference to the guidelines as requiring nullification of the Ordinance it would be acting contrary to the clear intent of the legislative body whose intent it is called upon to respect and enforce. Furthermore, the City Council amended the ordinance which indicates its desire for the Ordinance to remain in effect.

Adopting the Plaintiff's interpretation of the ordinance would undermine the legislative intent of City Council to provide a deterrent effect by requiring the inspection of residential property to prevent the sale of residential properties having serious structural or maintenance deficiencies which pose obvious health and welfare concerns. See Butcher v City of Detroit, 156 Mich App 165, 166-167; 401 NW2d 260 (1986); Butcher v Detroit, 131 Mich App 695, 702; 347 NW2d 702 (1984). The public interest in safe housing weighs against an interpretation of the ordinance to declare it void because the city council did not approve the guidelines of the building inspectors when the very purpose of the ordinance was to protect the public from the sale of residential properties with serious structural and maintenance deficiencies.

A second canon of statutory construction which would be violated by Plaintiffs construction of ordinance is that statutes should be construed to prevent absurdity, hardship, injustice, or prejudice to the public intent. Reisman v Regents of Wayne State University, 188 Mich App 526, 536; 470 NW2d 678 (1991); Michigan Dept of Natural Resources v Hermes, 101 Mich App 517; 301 NW2d 307 (1980); Matter of Marable, 90 Mich App 7; 282 NW2d 221 (1979); Flint Board of Education v Williams, 88 Mich App 8; 276 NW2d 499 (1979); State Farm Mut Auto Ins Co v Kurylowicz, 67 Mich App 568; 242 NW2d 530 (1976). A holding that the Ordinance is void because of a self imposed and nonessential requirement in the Ordinance, that had already been approved, would result in such an absurdity.

The provision requiring the City Council to approve the inspecting guidelines is not mandatory but only directory. It was not a condition precedent to the validity of the ordinance. The legislative intent was to provide protection for purchasers of residential dwellings. To declare the ordinance valid would thwart the very purpose for which the ordinance was created. Giving the

ordinary and accepted meaning to the mandatory word "shall" would clearly frustrate the city council's intent to provide habitable homes and to protect the unwary purchaser from fraud as evidenced by reading the ordinance as a whole. Browder v Int'l Fidelity Insurance Co, 413 Mich 603, 611-612; 321 NW2d 668 (1982). Upon examination of the ordinance, it becomes clear that the particular objective of the legislature in enacting it was to discourage the sale of shoddy housing.

A legislative intention that the word "shall" is to be construed as permissive appears from the spirit and purpose of the Ordinance when one looks at the context in which it is used or the relation into which it is put with other parts of the same ordinance. See Howard v Secretary of State, 260 Mich 568; 245 NW518 (1932). The compliance with approving the guidelines was a matter of form given for convenience and is unrelated to the effectiveness of the Ordinance. See Howell Township, supra.

II. THE PROVISION IN THE ORDINANCE WHICH REQUIRED APPROVAL OF CITY COUNCIL BEFORE THE GUIDELINES WERE EFFECTIVE IS SEVERABLE PURSUANT TO CITY CHARTER.

The Court of Appeals declined to address the severability issue. However, the provision in the City Charter with regard to severability constitutes a separate and independent basis for denying Plaintiff-Appellant's challenge to the validity of the ordinance.

Detroit City Charter, Section 1-1-10, provides as follows:

> Should a section, paragraph, sentence, clause, phrase or word of this Code be declared invalid or unconstitutional by a court of competent jurisdiction, such invalidity or unconstitutionality should not effect any of the remaining words, phrases, clauses, sentences, paragraphs or sections of this Code, since the same would have been enacted by the City Council without the incorporation in this Code if any such invalid or unconstitutional word, phrase, clause, sentence, paragraph or section. (App 68b).

In Blank v Department of Corrections, 222 Mich App 385; 564 NW2d 130 (1997), lv granted, 459 Mich 878 (1998), the Court of Appeals had before it a challenge to administrative rules that had been established by the Michigan Department of Corrections. The claim presented was that the administrative rules promulgated by the Michigan Department of Corrections were void since the procedure which had established the Joint Committee on Administrative Rules (JCAR), a legislative committee to veto administrative rules, violated the separation of powers doctrine. The Court of Appeals agreed that the JCAR procedure was in fact unconstitutional.

The claim then, went to whether or not that section was severable from the Administrative Procedure Act which otherwise would void the entire APA. The court noted that the severability provision, which is quite similar to Detroit's severability clause, has been interpreted to mean as follows:

> When a portion of an act is invalid in all possible applications, the invalid portion may be deleted and the court may determine by the rules of legislative intent whether the valid portion of the act shall be enforced. The law enforced after severance must be reasonable in light of the act as originally drafted. Independence of the valid from the invalid parts of an act does not depend on their being located in separate sections. When the valid object of the act can be achieved without the invalid part, the act will be upheld. [222 Mich App at 401.]

The court looked at the intent behind the administrative procedural act and determined that by declaring the JCAR section unconstitutional, the act was still valid. Interestingly, the court noted as follows:

> Even if we were to assume that given the legislature the opportunity to veto, the rule was a necessary element of the procedural protection intended by the APA, severance does not take away that opportunity. The legislature may still revoke or suspend a rule through the use of a bill passed by a majority of both houses and

> presented to the governor, and the JCAR may act to suspend rules between sessions to preserve the legislature's authority to take action. Because a valid object of the APA can be achieved without the legislative approval requirements of sections 45 and 46, those sections may be severed and the remaining portion of the APA shall be enforced. [222 Mich App at 402.]

As here, in the failure of City Council to approve the rules, it is quite clear that City Council could have gone back and modified the ordinance or repealed the ordinance, had they not been satisfied with the rules and regulations set forth by the Buildings and Safety Engineering Department.

In the instant case, the intent of the City council is clear for all to see in the record. The Council had before them the rules and regulations prepared by the Buildings and Safety Engineering Department, having received them on June 8, 1976 (Plaintiff's Exhibit 4; App 43b-48b). With the rules and regulations before them, Council went forward on June 9, 1976 and passed the ordinance with full knowledge of the contents of the rules and regulations. Such action by the Council amounts to clearly implied consent to those rules which have been renewed by implication repeatedly over the years, since Council could have done any number of things with respect to the ordinance but rather have allowed the Buildings and Safety Engineering Department to continue to administer the ordinance pursuant to these rules and regulations.

The fact that City Council did receive and place on file the rules and regulations provided by the Buildings and Safety Engineering Department shows that those rules and regulations were consistent with the Council's legislative intent. In receiving and putting the rules and regulations on file Council made those rules and regulations part of the public record, available for all citizens to review. Such action admits of no other interpretation but that the Council found the rules and

regulations to be acceptable and intended them to guide the Buildings and Safety Engineering Department in administering the ordinance. For all practical intents and purposes, "receiving and placing on file" of the guidelines is the same as "approving" the guidelines.

The offending section of the ordinance can and should be severed because the valid objects of the legislation can be achieved without the requirement of subsequent guideline approval. The Supreme Court has held that such invalid sections are severable when the valid objects of the legislation can be achieved without inclusion of requirements that impinge on the separation of powers. Blank, supra.

Indeed, MCL 8.5 directs that when a court finds a portion of an act invalid, the remainder of the act should be enforced to the extent that it can be given effect consistent with the legislative intent behind the act. Most recently, Michigan State Employees Association v Michigan Liquor Control Commission, 232 Mich App 456; 591 NW2d 353 (1998), the Court of Appeals noted that the plaintiffs in that case, like the plaintiffs in Blank, contended that if the challenged portion of the legislation in question were declared unconstitutional, those portions could not be severed from the remainder of the legislation, and the entire legislation must be discarded. The Court of Appeals, however, disagreed and held the unconstitutional aspects of the act were severable and the remainder should be enforced, to the extent possible, consistent with the legislative intent behind the act.

In the instant case, the ordinance is and has been enforceable without operation of the challenged provision. Indeed, the Department of Buildings and Safety Engineering did promulgate guidelines which have been in use for over 23 years. In fact, the long track record of this ordinance demonstrates that application of the guidelines by the department clearly and directly addresses the stated purpose of the ordinance, i.e., to maintain minimal standards of livability and habitability in

the city's housing stock and to protect the citizens from unscrupulous landlords who seek to profit from trade in housing below minimum standards of livability.

The portion of the ordinance which can be severed is the sentence which reads as follows: "The guidelines shall not be effective until approved by City Council." Additionally, the phrase, "as the City Council shall recommend by resolution" can be severed. In this case, removal of those provisions does not harm the ordinance nor the intent of the ordinance.

III. THE REQUIREMENT THAT CITY COUNCIL APPROVE THE GUIDELINES IS INVALID BECAUSE IT CONFLICTS WITH THE SEPARATION OF POWERS PROVISIONS OF THE CITY CHARTER.

The Court of Appeals declined to rule on the separation of power issue, but it too forms an independent basis for upholding the challenged ordinance.

A. The Requirement of Council Approval of Guidelines Conflicts with the Rule Making Power of the Executive Branch.

The government of the City of Detroit is created by the City's Home Rule Charter ("Charter"), adopted pursuant to the Home Rule City's Act, MCL 117.1 et seq. As required by MCL 117.3(a), the Charter provides for the separation of legislative from executive powers. Article 4 of the Charter creates the Legislative Branch, headed by the City Council; and Article 5 creates the Executive Branch, headed by the Mayor. Executive and administrative authority within city government is vested exclusively in the executive branch. (Detroit City Charter, Section 5-102). App 73b). The City Council is prohibited from giving orders to officers and employees of the Executive Branch or even addressing those officers and employees other than through the mayor. (Detroit City Charter, Section 4-113) (See App 71b).

Among the officers of the Executive Branch are department directors, who are appointed by the Mayor. (Detroit City Charter, Section 5-103) (App 73b). A department director's powers include the power to prepare rules governing dealings between the department and the public. (Detroit City Charter, Section 5-106.4) (App 74b). The Charter sets forth the procedure for making rules. (Detroit City Charter, Section 2-111) (App 68b). A rule prepared by a department director becomes effective when the prescribed procedures have been complied with (Detroit City Charter, Section 5-106.4) (See App 74b). Significantly, the Charter mandated rule making procedure does not include any sort of review by the City Council. (Detroit City Charter, Section 2-111) (App 69b-70b).

The guidelines challenged by Plaintiff govern the inspection of citizen's homes and the conditions that must be met before the Department of Buildings and Safety Engineering gives a citizen a certificate that is required for lawful sale of the home. Those guidelines therefore are rules governing dealings between the Department of Buildings and Safety Engineering and the public. According to the Charter (Detroit City Charter, Section 5-106.4) (See App 74b, the power to adopt those guidelines is vested exclusively in the director of the Department of Buildings and Safety Engineering, who reports only to the mayor, not to the City Council. The guidelines becomes effective upon compliance with the rule making procedures set forth in the Charter.

The City Council does not have the authority to amend the Charter by adding to its procedures a requirement that the guidelines be approved by the City Council before they can take effect. Indeed, the Charter can be amended only by a majority vote of the electors in the City (Constitution 1963, Article 7, Section 22; MCL 117.5(e).) The attempt by the Council to do so in Code Section 26-3-6 amounts, intentionally or otherwise, to a usurpation of power reserved to the

Executive Branch, and thus that portion of the Ordinance is constitutionally invalid. Therefore, that directive cannot be enforced.

B. The Requirement of Council Approval of Rules Conflicts with the Mayor's Vote Power.

Like the United States and Michigan Constitutions the Charter includes provisions governing the enactment of ordinances and resolutions, and those provisions include the power of the mayor to veto ordinance and resolutions. (Detroit City Charter, Section 4-119) (See App 72b). With certain narrow exceptions that do not apply here, no ordinance or resolution adopted by City Council can become effective unless and until it is presented to the mayor for approval or veto. If the mayor vetoes an ordinance or resolution it cannot take effect unless the veto is overridden by a two-thirds vote of the City Council.

The trial court rejected Defendant's Motion for Summary Disposition, finding that there was no violation of the enactment of presentment rules due to the fact that the ordinance was not submitted to or approved by less than the full legislative body of the City Council. Since there was no subcommittee of the City Council, as in the Blank, supra, case, there was no silent, unchecked legislative veto. (App 12b-15b) The fact that the challenged ordinance required approval of the guidelines by the City council as a whole rather than by a subcommittee is not the pivotal issue. What brings the challenged ordinance within the ambit of Blank is the requirement in the ordinance that the guidelines could not become effective without subsequent council approval. By that provision, the City Council, intentionally or unintentionally, took unto itself the power to invalidate those guidelines by its silence; that is if the City Council did not subsequently approve the guidelines they would never take effect. Such inaction by the City Council would then become the termination

of the ordinance process and would thus circumvent any mayoral veto.

As the Court of Appeals held in Blank, supra, the vetoing of rules made by the executive is a form of law making, no less than the enactment of a statute, ordinance, or resolution. Ordinances must therefore be subject to executive veto. When, in the challenged ordinance, the city council made its inaction a form of legislative action, the city council effectively insulated the guidelines from mayoral veto. Such a construction cannot succeed because it flies in the face of the separation of powers enshrined in the Charter.

RELIEF REQUESTED

WHEREFORE, Defendant-Appellee City of Detroit prays that this Honorable Court deny Plaintiff-Appellant's requested relief and affirm the decision of the Court of Appeals.

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Dated:

STATE OF MICHIGAN
IN THE SUPREME COURT OF MICHIGAN

APPEAL FROM THE COURT OF APPEALS

The Honorable Mark J. Cavanagh, Presiding Judge

CASTLE INVESTMENT COMPANY,

Plaintiff-Appellant,

v

CITY OF DETROIT, A Municipal, Corporation,

Defendant-Appellee.

Supreme Court No. 121598

Court of Appeals No. 224411

Wayne County Circuit Court
No. 98-836330-CZ

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PROOF OF SERVICE

STATE OF MICHIGAN)
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COUNTY OF WAYNE)

I, Sandra L. Davis, certify that I caused two (2)copies of **Brief on Appeal - Appellee City of Detroit, Oral Argument Requested, and Proof of Service and Appendix** to be served upon the following counselor of record on June 20, 2003:

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by United States mail, first class, postage prepaid, on June 20, 2003.

Sandra L. Davis

Subscribed and sworn to before me
this 20th day of June, 2003

Notary Public, Wayne County, MI
My Commission Expires: 9-3-03